

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4710 of 1981

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH

=====

1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
2. To be referred to the Reporter or not? : NO
3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge? : NO

HIMATLAL RAMJIBHAI PATEL RESIDING AT DEHLA,

Versus

BHVSVNAGAR MUNICIPALITY SERVICES BE MADE UPON THE CHIEF

Appearance:

MR SK JHAVERI for Petitioner

MR MR ANAND for Respondent No. 1, 2

CORAM : MR.JUSTICE M.S.SHAH

Date of decision: 14/06/1999

ORAL JUDGEMENT

In this petition under Article 226 of the Constitution, the petitioner has prayed for a direction to respondent No. 1 Bhavnagar Municipality to appoint the petitioner to the post of Senior Clerk in the vacancy that had arisen on 1-6-1977 and also to direct the Municipality to pay the petitioner the acting allowance of the Senior Clerk from 1-10-1976 till the petitioner's appointment as Senior Clerk. The petitioner has also

prayed for quashing and setting aside resolution No. 1235 dated 20-7-1981 of the Public Health Committee and the consequential order of the President of the Municipality bearing No. 1166 dated 31-7-1981 and the further orders No. 1052 dated 3-8-1981 and 2059 dated 21-10-1981 by which the acting allowance paid to the petitioner was sought to be recovered with effect from 1-10-1976. The petitioner had also prayed that the Municipality be directed to treat the petitioner as having continued in the post of Senior Clerk and to pay the petitioner all the allowances which were paid to respondent No. 2. A reference is also made to audit note of the year 1978-79 (para 22) and injunction is sought to restrain the Municipality from implementing the audit note.

2. It appears that the petitioner claims to be senior to respondent No. 2 Ramaniklal M. Parmar for the purpose of promotion to the cadre of Senior Clerk. The petitioner claims to have joined services of the Municipality in the year 1960. Therefore, the petitioner claims to be senior to respondent No. 2 who joined the services of the Municipality in the year 1963. However, it is pointed out by respondent No. 2 in his affidavit in reply that the petitioner was appointed on 1-1-1960 as a sippoy which was in Class-IV service and that the petitioner was appointed as Junior Clerk only on 4-11-1963 whereas respondent No. 2 was appointed as Junior Clerk on 19-8-1963 and, therefore, respondent No. 2 had joined the cadre of Junior Clerks prior to the petitioner. There is considerable substance in the aforesaid stand and, therefore, it is not possible to grant the main relief prayed for by the petitioner that the Municipality be directed to appoint the petitioner to the post of Senior Clerk with effect from 1-6-1977. Apart from the question of seniority between the petitioner and respondent No. 2, no direction can be given that the petitioner be promoted or appointed to a particular post. It is for the Municipality to consider the case of all eligible persons in accordance with the relevant recruitment rules. In any case, since the claim of the petitioner for seniority vis-a-vis respondent No. 2 in the cadre of Junior Clerks cannot be upheld, it cannot be said that the petitioner was superseded in the matter of promotion to the cadre of Senior Clerks.

3. At the hearing of this petition, the Court is informed that both the petitioner as well as respondent No. 2 have retired from service and, therefore, also the petition has become academic. However, the learned counsel for the petitioner submits that the Municipality

sought to recover the acting allowance which was paid to the petitioner when the petitioner was holding charge of the post of Senior Clerk in the Health Department for looking after the work under the Prevention of Food Adulteration Act. It is pointed out that by resolution No. 1052 dated 3-8-1981 (Annexure "E" to the petition) the amount of acting allowance paid to the petitioner from 1.4.1978 till March, 1981 is sought to be recovered as per the audit objection in para 22 for the year 1978-79. By subsequent order No. 2759 (Annexure "E"-page 35) the amount is worked out at Rs.2371-60. The learned counsel for the petitioner, therefore, submits that the said orders are required to be quashed and set aside as the orders were passed not only in violation of principles of natural justice but because also the acting allowance was paid to the petitioner for rendering services as a Senior Clerk in the Health Department and that the petitioner having rendered services and the acting allowance having been paid to the petitioner for the services so rendered, the Municipality cannot be permitted to make the recovery thereof.

4. In the affidavit in reply filed by G.T. Karelia on behalf of the Municipality, it is stated as under :-

"In view of the facts of the case, the petitioner was not entitled to any hearing. But even if the petitioner makes a representation regarding the recovery, his case would be considered by the authority".

It is further stated in para 13 of the reply affidavit on behalf of respondent No. 1 that the Municipality was not required to pay the acting allowance from 23-7-1980 onwards. It, therefore, appears that now the stand of the Municipality (which is, during pendency of the petition, converted into Bhavnagar Municipal Corporation) is that the recovery is required to be made only for the amount paid for the period from 23-7-1980 to 31-3-1981 which works out to about 9 months period.

5. Considering the fact that the main relief prayed for by the petitioner for a declaration regarding appointment/promotion to the post of Senior Clerk with effect from 1-6-1977 is being denied to the petitioner and that the impugned order for recovery of the amount of acting allowance was passed by the respondent Municipality without giving the petitioner any opportunity of being heard and that the petitioner has already retired from service by now, the Court would quash and set aside the impugned order of recovery of

acting allowance without reserving any liberty to respondent No. 1 Municipality/Bhavnagar Municipal Corporation to make recovery of the amount in question which was already paid by the Municipality to the petitioner as acting allowance as far back as during the period between April, 1978 and March, 1981 as stated above. The dispute was only for the period from July, 1980 to March, 1981. Even for the said period the recovery orders shall not be implemented or acted upon since they were already stayed by this Court during pendency of the petition and also because the said orders are found to be illegal as having been passed in violation of the principles of natural justice.

6. Accordingly, the prayer made by the petitioner to direct the Bhavnagar Municipality to appoint the petitioner to the post of Senior Clerk with effect from 1-6-1977 is rejected, but as far as the prayer for quashing resolutions/orders passed by the concerned authorities of respondent No. 1 Municipality for recovery of acting allowance paid to the petitioner till March, 1981 is concerned, the said resolutions and orders are declared to be illegal and are hereby quashed and set aside.

Rule is made absolute to the aforesaid extent only with no order as to costs.

June 14, 1999 (M.S. Shah, J.)
sundar/-